

# RECORD IMPOUNDED

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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

### SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1790-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AQUIL MALIK, a/k/a  
MALIK AQUIL,

Defendant-Appellant.

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Submitted September 19, 2022 – Decided December 6, 2022

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law  
Division, Morris County, Indictment No. 15-04-0289.

Joseph E. Krakora, Public Defender, attorney for  
appellant (Damen J. Thiel, Designated Counsel, on the  
brief).

Robert J. Carroll, Morris County Prosecutor, attorney  
for respondent (Paula Jordao, Assistant Prosecutor, on  
the brief).

PER CURIAM

Defendant Aquil Malik appeals from a Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. He presents the following arguments for our consideration:

POINT I

THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF BECAUSE TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CALL MULTIPLE EXCULPATORY WITNESSES TO TESTIFY ON DEFENDANT'S BEHALF.

POINT II

THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION BECAUSE DEFENDANT WAS NOT PROCEDURALLY BARRED UNDER R. 3:22-4 FROM CLAIMING INEFFECTIVE ASSISTANCE DUE TO TRIAL COUNSEL'S FAILURE TO OBJECT TO AN UNREPRESENTATIVE JURY.

POINT III

THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S PEREMPTORY CHALLENGES AND AN UNREPRESENTATIVE SEATED JURY.

#### POINT IV

THE PCR COURT ERRED IN DENYING DEFENDANT'S PETITION BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AN UNREPRESENTATIVE JURY POOL OR PANEL.

Having reviewed the record and applicable legal standards, we are unpersuaded by defendant's arguments and affirm.

The procedural history and factual background are detailed in our opinion on defendant's direct appeal affirming his conviction for first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(7). State v. Malik, No. A-2683-16 (App. Div. Dec. 10, 2018) (slip op. at 1). He was sentenced to a ten-year term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. We limit our discussion to the issues raised on the PCR appeal.

#### I.

In his PCR application, defendant alleged trial counsel was ineffective for failing to present additional exculpatory witnesses, object to the jury charge on aggravated sexual assault, object to the jury which seated no Black people, or move to change venue. The PCR court denied defendant's ineffective assistance of counsel (IAC) claims for three reasons.

First, it found defendant's jury charge challenge was procedurally barred under R. 3:22-5 because it was previously addressed in his direct appeal.<sup>1</sup>

Second, the PCR court determined that R. 3:22-4(a) barred defendant's jury composition and venue claims as the factual predicate because these issues required little, if any, investigation and could have reasonably been raised during the trial proceedings or on direct appeal. The PCR court added that defendant failed to allege any specific facts on how the jury composition prejudiced the outcome of his trial or how the prosecutor used biased peremptory challenges during jury selection.

Third, the court found trial counsel was not deficient for calling only one of eight potential witnesses to testify because, in addition to critical hearsay and credibility issues these potential witnesses possessed, counsel "could have reasonably concluded that calling these witnesses did not advance the defense theory of consent or might otherwise prove inconsistent with other evidence."

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<sup>1</sup> On direct appeal we concluded the jury instruction was proper because the "trial court did not deviate from the model charge" and "[t]he charge . . . accurately set forth the law that was applicable to the facts of [the] case." See Malik, slip op. at 28. We also found a jury instruction sought by the defense on the element of mental incapacity "would have been improper and confusing to the jury," as there was no evidence introduced to support it. Ibid.

The court further noted defendant failed to meet the Strickland<sup>2</sup> standard given he had "not established a reasonable probability . . . testimony from the additional eight witnesses would have altered the outcome of the trial because, among other reasons, the witnesses were not present at the scene of the assault and thus had no personal knowledge of whether the victim consented to the sex acts."

Ultimately, the court concluded that an evidentiary hearing was not warranted because defendant failed to present a prima facie case of IAC.

## II.

A judge's decision to deny a PCR petition without an evidentiary hearing is reviewed under an abuse of discretion standard; however, we may review the factual inferences and legal conclusions drawn by the court de novo. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58 (1997), cert. denied, 522 U.S. 850 (1997)); State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016).

In light of the standard, we agree with the PCR court that trial counsel was not deficient for calling only one witness to testify. As the court noted, this was

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<sup>2</sup> Strickland v. Washington, 466 U.S. 668 (1984).

trial strategy.<sup>3</sup> Calling the only witness with first-hand knowledge of the incident was not IAC. Defendant has not shown he suffered prejudice as a result of this trial strategy. The PCR court properly concluded that this claim failed both prongs of Strickland.<sup>4</sup>

In dismissing defendant's jury composition and venue arguments, the PCR court relied on R. 3:22-4(a) and Strickland. Defendant asserted that trial counsel was ineffective because they failed to object to a jury which seated no Black people, failed to move to change venue due to the unrepresentative jury, and failed to object to the State's use of peremptory challenges during jury selection. None of these issues were raised in defendant's direct appeal.

R. 3:22-4(a) provides that "[a]ny ground for relief not raised in the proceedings resulting in the conviction, . . . or in any appeal taken in any such

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<sup>3</sup> The testifying witness, Jose Sosa, was the only witness who observed the incident first-hand. The remaining "witnesses" lacked personal knowledge of the assault. Some reported viewing a video recording of the assault which was never recovered by police. And many of these "witnesses" mentioned seeing the victim drinking alcohol shortly before the incident, an observation which would have undermined defense's theory of consent.

<sup>4</sup> Under Strickland, a defendant first must show that his or her attorney's handling of the matter "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688; see also State v. Fritz, 105 N.J. 42, 58 (1987). A defendant also must show there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; see also Fritz, 105 N.J. at 60-61.

proceedings is barred from assertion in a proceeding . . ." for PCR. R. 3:22-4(a); see also State v. Nash, 212 N.J. 518, 546 (2013) (recognizing that Rule 3:22-4(a) bars a defendant from employing a PCR petition to assert a claim that could have been raised at trial or on direct appeal).

While we agree that the issues of jury composition were discoverable at the time of trial and could have been raised then or in defendant's direct appeal, we also appreciate that defendant was represented by the same counsel at trial and on appeal, which decreased the likelihood of these issues being presented.<sup>5</sup> The PCR court noted this as well; therefore, it further reviewed and dismissed these claims under Strickland.

The court found defendant's application lacked "any allegation or showing that the prosecutor improperly exercised peremptory challenges on the basis of race." As such, defendant could not "meet the high burden of showing either defective performance by [his] counselor or that any deficient performance affected the outcome."

"[A] petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Porter, 216 N.J. 343, 355 (2013)

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<sup>5</sup> In his merits brief, defendant emphasizes the unlikelihood of his appellate counsel to accuse herself of being ineffective at trial.

(quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). Allegations that "are too vague, conclusory, or speculative" will not establish a prima facie case of IAC. Ibid. (quoting State v. Marshall, 148 N.J. at 158).

According to defendant, the failures of trial counsel – not objecting to the seated jury, jury pool, or State's peremptory challenges – denied him a representative nondiscriminatory seated jury, which goes directly to his guilt or innocence. His argument is based on the fact that the jury seated no Black people and that the State used peremptory challenges without objection. However, defendant provided no evidence that the seated jury was discriminatory.

Both defendant and the State exercised three peremptory challenges without objection by the other party. There is nothing in the record to indicate that the jurors excused were Black or that the State's challenges were racially biased. Defendant has failed to establish that the racial composition of the jury was due to a systemic exclusion of Black jurors.

Based on this record, we agree with the PCR court that defendant's bald assertions do not establish a prima facie case of IAC. Porter, 216 N.J. at 355. We find no reason to disturb the order of the PCR court.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION